Supreme Court, U.S.
FILED

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No. 00-

IN THE

Supreme Court of the United States

NATURAL PARENTS OF J.B.,

Petitioners,

v.

FLORIDA DEPARTMENT OF CHILDREN AND FAMILIES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a state statute providing that "all hearings involving termination of parental rights are confidential and closed to the public," precluding a court from considering the particularized facts and balancing the interests of the parents, the child, and the public, violate the First and Fourteenth Amendments?

LIST OF PARTIES

Parties not named in the caption of the case include:

Kathy Bush (mother)
Craig Bush (father)
J.B. (minor child)

TABLE OF CONTENTS

	Page
Question Presented	i
List of Parties	ii
Table of Contents	iii
Table of Cited Authorities	iv
Table of Appendices	vi
Opinions Below	1
Statement of Jursidiction	1
Constitutional Provisions and Statutes Involved	2
Statement of the Case	3
Reasons for Granting the Writ	7
This Court Should Grant Review to Answer the Important but Unanswered Question of Whether the Closure of *All* Hearings in Termination of Parental Rights Proceedings Violates the First and Fourteenth Amendments	7
Conclusion	12

TABLE OF CITED AUTHORITIES

Page

Cases:

Brown & Williamson Tobacco Corp. v. Federal Trade Comm'n, 710 F.2d 1165 (6th Cir. 1983) 11

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 1, 2

Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) 11

In re Oliver, 333 U.S. 257 (1948) 8

Lassiter v. Department of Soc. Serv., 452 U.S. 18 (1981) 8

M.L.B. v. S.L.J., 519 U.S. 102 (1996) 4, 8

New Jersey Div. of Youth & Family Servs. v. J.B., 576 A.2d 261 (N.J. 1990) 9, 11

Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984) 11

Publicker Indus. v. Cohen, 733 F.2d 1059 (3d Cir. 1984) 11

Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) 11

Cited Authorities

Page

Rushford v. New Yorker Magazine, Inc., 846 F.2d 249 (4th Cir. 1988) 11

Santosky v. Kramer, 455 U.S. 745 (1982) 8, 10

Westmoreland v. Columbia Broadcasting Sys., 752 F.2d 16 (2d Cir. 1984), *cert. denied*, 472 U.S. 1017, 105 S. Ct. 3478, 87 L. Ed. 2d 614 (1985) 11

United States Constitution:

First Amendment ..... i, 2, 6, 7, 12

Sixth Amendment 4, 5, 7

Fourteenth Amendment ..... i, 2, 4, 6, 7

Statutes:

28 U.S.C. § 1257(a) 2

Fla. Stat. § 39.467(4) (1997) 4

Fla. Stat. § 39.507(2) 3

Fla. Stat. § 39.809(4) (Supp. 1998) 2, 4, 8

TABLE OF APPENDICES

Page

Appendix A — Opinion of the Supreme Court of Florida Dated February 22, 2001 ..... 1a

Appendix B — Opinion of the District Court of Appeal of the State of Florida, Fourth District Dated and Filed June 23, 1999 ..... 27a

Appendix C — Order of the Circuit Court of the 17th Judicial Circuit in and for Broward County, Florida on Natural Parents' Motion to Declare Unconstitutional Florida Statute §§ 39.467(3) and (4) Dated June 11, 1998 ..... 44a

OPINIONS BELOW

The decision of the Supreme Court of Florida is reported at 780 So. 2d 6. It is reproduced in the appendix at App. A, 1a-26a.[1] The decision of the Florida Fourth District Court of Appeal is reported at 736 So. 2d 111. It is reproduced in the appendix at App. B, 27a-43a. The Order of the Circuit Court for the Seventeenth Judicial Circuit of Florida is unreported, and reproduced in the appendix at App. C, 44a-51a.

STATEMENT OF JURISDICTION

The opinion of the Supreme Court of Florida was rendered on February 22, 2001. That decision approved a decision of the District Court of Appeal, quashing an order of the Circuit Court which declared unconstitutional a statute closing termination of parental rights proceedings to the public. App. 1a-26a. No final termination of parental rights proceeding has occurred in the Circuit Court.

The pendency of further state court proceedings does not preclude a finding that the judgment adjudicating the federal issue is "final" for jurisdictional purposes. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (finality requirement is satisfied where "the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings."). *Id.* at 480. *See also id.*, 420 U.S. at 484-485 (" 'Whichever way we were to decide on the merits, it would be intolerable to leave unanswered, under these

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1. The pleadings and decisions below misstate the name of the State agency, which is the Department of Children and Families, as shown in the caption to this Petition.

circumstances, an important question of freedom of the press under the First Amendment; an uneasy and unsettled constitutional posture of [a statute] could only further harm the operation of a free press.' ") (*quoting Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 247 n.6 (1974)) (internal citations omitted).

Thus, based on the exceptions to the final judgment rule noted in *Cox Broadcasting*, jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

First Amendment

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment (Due Process Clause)

> Section 1. . . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . .

Section 39.809, Fla. Stat. (Supp. 1998)

* * *

> (4) All hearings involving termination of parental rights are confidential and closed to the public. . . .

* * *

STATEMENT OF THE CASE

In 1996, the Florida Department of Children and Families brought an action seeking a declaration that J.B. was dependent and in need of care. Although dependency proceedings are presumptively "open to the public" under Florida law (§ 39.507(2), Fla. Stat.), the parents sought to close the proceedings to protect the child, and sought a gag order to prohibit the release of information about the case. That closure request was denied by the trial court. App. 3a.

The case received wide publicity because the State alleged that the mother intentionally made the child ill, requiring multiple hospitalizations and surgeries, a form of child abuse known as Munchausen Syndrome by Proxy. The mother denied the allegations, but the child was removed from the family's custody in 1996.

The State then initiated proceedings to terminate the parental rights of both the mother and father of J.B.[2] Although the prior dependency proceeding had been open, and reported in the press, Florida law mandates that termination of parental rights proceedings are *per se* closed. The trial judge has no discretion to deviate from the statute, which provides in relevant part:

> All hearings involving termination of parental rights are confidential and closed to the public.

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2. Criminal charges were also brought against the mother. She was convicted of aggravated child abuse and organized fraud, in a public (and widely reported) trial. She was sentenced to five years imprisonment, but remains free on bond while the appeal of the conviction is pending in the Florida Fourth District Court of Appeal, Case No. 4D00-384. There has not been a final termination of parental rights hearing, and the child, who will be fourteen on May 22, 2001, is still separated from her mother, father, and siblings.

Section 39.467(4), Fla. Stat. (1997), *renumbered* as Section 39.809(4), Fla. Stat. (Supp. 1998).

The parents moved to declare the statute unconstitutional as violative of the Fourteenth Amendment right to due process of law, arguing that on its face the statute violates the historical Anglo-American open-court principle embodied in the Fourteenth Amendment.[3] Relying on the then-recent decision in *M.L.B. v. S.L.J.*, 519 U.S. 102, 118-119 (1996) (" 'Few forms of state action,' . . . 'are both so severe and so irreversible.' . . . [T]he parent's interest [is] 'commanding,' indeed, 'far more precious than any property right.' "), the parents argued that on the spectrum of cases, running from criminal to purely civil, the liberty interests at stake were of the highest order, and therefore *per se* closure violated constitutional principles. The Circuit Court agreed, and struck the statute as being "UNCONSTITUTIONAL." App. 49a.

> It [the statute] allows no discretion, no balancing, no weighing of factors. On its face it violates the historical Anglo-American open-court principle embedded in the Fourteenth Amendment.

App. 46a. The court also found that "any compelling reason for closure in the parental termination proceeding is severely undermined" by the fact that the same facts are litigated in dependency proceedings, which are presumptively open by statute. App. 48a. And, the court had before it a large

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3. The Supreme Court of Florida stated that the parents also relied on the Sixth Amendment. App. 4a. The Sixth Amendment was discussed in the context of the tradition of open trials, but was never asserted in this civil case as an independent basis for relief.

collection of articles about the J.B. case that had been published in the press, further undermining any privacy interests asserted by the State on behalf of the child. App. 48a n.1.

The State sought immediate review by a petition for writ of common law certiorari to the Fourth District Court of Appeal. That court, after hearing argument, granted certiorari and quashed the Order of the Circuit Court. The Fourth District Court of Appeal refused to extend due process to require presumptively open proceedings in termination of parental rights cases. App. 38a. The court distinguished the criminal cases involving an accused's Sixth Amendment right to a public trial, because termination of parental rights proceedings are not criminal cases. App. 39a-40a. Based on "an express public policy of closure" in a discrete set of cases involving child welfare, the court upheld the constitutionality of the statute (App. 42a), but certified a question of great public importance to the Supreme Court of Florida, asking whether the statute was "valid under the United States and Florida constitutional provisions respecting access of the public and media to judicial proceedings." App. 43a.

A divided Supreme Court of Florida (5-2) answered the certified question in the affirmative, "agree[ing] with the decision and rationale of the Fourth District." App. 2a, 5a, 12a. The court likened parental termination proceedings to juvenile proceedings, and concluded:

> There is no constitutional requirement that juvenile proceedings be presumptively open to the public. The Legislature has validly declared that the public policy of the State requires the mandatory closure of TPR proceedings. Because

> there is no presumption of openness in juvenile proceedings, and because none is constitutionally required, there is no requirement that an order of closure be made only after a case-by-case determination.

App. 12a-13a.

Two justices dissented, believing that mandatory closures did not pass muster:

> [I]n order to pass constitutional muster . . . the decision to close TPR proceedings should be vested in the sound discretion of the trial court on a case-by-case basis, just as it is in dependency proceedings. An appropriate balance must be struck among the many interests to be considered — the potential harm to the child, the rights of the parents, the right of public access and the promotion of fairness and public confidence in the judicial system.

App. 26a.

The decision of the Supreme Court of Florida precluded that balancing, and approved the complete closure of proceedings in which the State seeks to permanently terminate parental rights. Certiorari is sought to determine if the Florida Supreme Court's decision comports with the First and Fourteenth Amendments.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT REVIEW TO ANSWER THE IMPORTANT BUT UNANSWERED QUESTION OF WHETHER THE CLOSURE OF *ALL* HEARINGS IN TERMINATION OF PARENTAL RIGHTS PROCEEDINGS VIOLATES THE FIRST AND FOURTEENTH AMENDMENTS

Attempts to close judicial proceedings to the public are disfavored and closely scrutinized. Although the Sixth Amendment guarantees an accused in a criminal case the right to a public trial, this Court has never decided whether the press and public have a First Amendment right of access to civil judicial proceedings. Nor has this Court ever decided whether parents in a termination of parental rights proceeding, a special class of civil cases threatening parents with the loss of a fundamental liberty interest, have a constitutional right to a public hearing, analogous to the Sixth Amendment right to a public criminal trial. This termination of parental rights case, in which the parents are *accused* by the State and seek a public hearing, presents that important but unanswered question of constitutional law. Petitioners submit that the Due Process Clause of the Fourteenth Amendment and the First Amendment guarantee the right, at the least, to have a judge balance the competing interests prior to closing a hearing in a termination of parental rights case.[4]

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4. A dissenting justice below, opposing the mandatory closure rule and advocating a balancing rule, recognized that in termination of parental rights proceedings, "the conduct of adult parents is the focus and the rights of those parents are being adjudicated on a permanent basis." (Anstead, J., dissenting). App. 15a.

Florida's statutory closure of "[*a*]*ll* hearings involving termination of parental rights" (§ 39.809(4), Fla. Stat.) (emphasis supplied) subjects parents who contest the adversarial state-initiated proceeding to the "menace to liberty" condemned by this Court:

> The traditional Anglo-American distrust for secret trials has been variously ascribed to the notorious use of this practice by the Spanish Inquisition, to the excesses of the English Court of Star Chamber, and to the French Monarchy's abuse of the *lettre de cachet*. All of these institutions obviously symbolized a menace to liberty.

In re Oliver, 333 U.S. 257, 268-269 (1948).

And while the state may be motivated by the best interest of the child to initiate proceedings to terminate parental rights, it is well established that the termination of parental rights implicates a fundamental liberty interest *of the parents*. *See M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996) ("Choices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as 'of basic importance in our society,' *Boddie*, 401 U.S., at 376 . . . , rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect."); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (acknowledging "this Court's historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment"); *cf. Lassiter v. Department of Soc. Serv.*, 452 U.S. 18, 37 (1981) (it was "not disputed that state intervention to terminate the relationship between [a parent] and [the] child must be accomplished by procedures meeting the requisites of the Due Process Clause") (Blackmun, J., dissenting).

The court below upheld the mandatory closure of termination of parental rights proceedings "without so much as a mention of the parents' or the public's right of access to the courts" and "without . . . considering the competing interests and other relevant circumstances. . . ." App. 19a (Anstead, J., dissenting). Justice Pariente, also dissenting, agreed with Petitioners that "a mandatory closure requirement . . . under the circumstances of this case in particular, may be constitutionally infirm." App. 23a. This Court should grant review to consider that question, on which the state courts are divided. *Compare, New Jersey Div. of Youth & Family Servs. v. J.B.*, 576 A.2d 261, 266 (N.J. 1990) ("A case by case determination is necessary in order to narrowly tailor the restriction to the governmental interest served.").

Florida's mandatory closure rule in termination of parental rights proceedings is the minority view among the states. Only two other states have mandatory closure by statute.[5] Twelve states' proceedings are presumptively closed, but the court can open them to additional persons, such as those with a direct interest in the case or in the work of the court, under specific conditions.[6] In thirteen states termination of parental rights proceedings are closed, but

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5. *See* Mass. Gen. Laws Ann. Ch. 210 §§ 3, 6; Wisc. Stat. Ann. § 48.424.

6. *See* Alaska Stat. § 47.10.070, § 47.10.088; Ariz. Rev. Stat. § 8-537; D.C. Code Ann. § 16-2358(c); Haw. Rev. Stat. §§ 571-11(2), 571-41; Idaho Code § 16-2009; La. Stat. Ann. Child. Code Art. 407; Minn. Stat. Ann. § 260C.163; Mo. Ann. Stat. §§ 211.171, 211.447; N.H. Rev. Stat. Ann. § 170-C:10; N.D. Cent. Code § 27-20-24; S.C. Code Ann. §§ 20-7-736, 20-7-755; Wash. Rev. Code §§ 13.34.190, 13.34.110.

judges have discretion to open them.[7] In thirteen other states, such proceedings are presumptively open.[8] And ten states do not appear to have addressed the issue in their statutes.[9]

In *Santosky v. Kramer*, the Court noted that New York's general civil standard of proof for termination of parental rights was out of synch with the majority of other states, and the Court granted review to determine if New York's approach was "constitutionally sufficient." 455 U.S. at 749-750 n.3. Here, Florida's mandatory closure of termination of parental rights proceedings is out of synch with the majority of other states, and is constitutionally insufficient.

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7. *See* Cal. Welf. & Inst. Code §§ 346, 366.26; Del. Code Ann. Tit. 13 § 1107; Ga. Code Ann. §§ 15-11-78, 15-11-104; Kan. Stat. Ann. §§ 38-1552, 38-1581; Ky. Rev. Stat. Ann. § 625.080; Md. Fam. Law R. 9-109; Mont. Code Ann. §§ 42-2-502, 42-6-101; Nev. Rev. Stat. Ann. § 128.090; Okla. Stat. Tit. 10 § 7003-4.1; S.D. Codified Laws § 26-7A-36; Utah Code Ann. § 78-3a-406; 15A Vt. Stat. Ann. §§ 3-203, 3-501; Va. Code Ann. §§ 16.1-302., 16.1-283.

8. *See* Ark. Code Ann. § 9-27-325; Colo. Rev. Stat. Ann. §§ 19-1-106, 19-3-602; Conn. Gen. Stat. §§ 46b-1, 46b-11; 705 Ill. Comp. Stat. § 405/1-5 (open to media, closed to general public); Ind. Code § 31-32-6-2 (court must make a determination in each case); Iowa Code Ann. § 232.117; Mich. Court Rules 5.925, 5.974; N.M. Stat. Ann. § 32A-4-20 (open to media, but closed to public); N.Y. Comp. Codes R. & Regs., Tit. 22 § 205.4; N.C. Gen. Stat. § 7B-801 (court must make a determination in each case); Ohio Rev. Code Ann. § 2151.35; Or. Rev. Stat. §§ 419B.521(3), 419B.310(1); Tex. Fam. Code Ann. § 105.003.

9. Alabama, Maine, Mississippi, Nebraska, New Jersey (case law says presumed closed, with discretion to open); Pennsylvania; Rhode Island; Tennessee; West Virginia, and Wyoming.

The decision below is also inconsistent with the broad principle of openness of judicial proceedings articulated by this Court. *See Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984) ("The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered."); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607-608 (1982) ("We agree with appellee that the first interest — safeguarding the physical and psychological well-being of a minor — is a compelling one. But as compelling as that interest is, it does not justify a mandatory closure rule, for it is clear that the circumstances of the particular case may affect the significance of the interest."); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 n.17 (1980) ("historically both civil and criminal trials have been presumptively open").

Subsequent to those cases, federal circuit courts of appeal have observed that the rationale underlying the right of access to criminal trials applies with equal force to civil trials. *See New Jersey Div. of Youth & Family Servs. v. J.B.*, 576 A.2d 261, 266 (N.J. 1990), *citing Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988); *Westmoreland v. Columbia Broadcasting Sys.*, 752 F.2d 16, 22-23 (2d Cir. 1984), *cert. denied*, 472 U.S. 1017, 105 S. Ct. 3478, 87 L. Ed. 2d 614 (1985); *Publicker Indus. v. Cohen*, 733 F.2d 1059, 1067-71 (3d Cir. 1984); *Brown & Williamson Tobacco Corp. v. Federal Trade Comm'n*, 710 F.2d 1165, 1177-79 (6th Cir. 1983).

Whether one views this as a case about access to judicial proceedings, under the First Amendment, or as a case about a parent's Due Process right to a public hearing before the State may take away one's child, the Supreme Court of Florida's rejection of the historical commitment to open judicial proceedings merits review by this Court.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE SUPREME COURT OF FLORIDA DATED FEBRUARY 22, 2001

SUPREME COURT OF FLORIDA

No. SC96171

THE NATURAL PARENTS OF J.B.,

Petitioners,

vs.

FLORIDA DEPARTMENT OF CHILDREN AND FAMILY SERVICES, etc.,

Respondent.

[February 22, 2001]

QUINCE, J.

We have for review a decision on the following question certified by the Fourth District Court of Appeal to be of great public importance:

> IS SECTION 39.467(4), NOW SECTION 39.809(4), FLORIDA STATUTES (SUPP. 1998), REQUIRING A MANDATORY CLOSURE OF ALL HEARINGS IN TPR PROCEEDINGS VALID UNDER THE UNITED STATES AND FLORIDA CONSTITUTIONAL PROVISIONS RESPECTING ACCESS OF THE PUBLIC AND MEDIA TO JUDICIAL PROCEEDINGS?

Appendix A

Department of Children & Family Services v. Natural Parents of J.B., 736 So. 2d 111 (Fla. 4th DCA 1999). We have jurisdiction. Art. V, § 3(b)(4), Fla. Const.

For the reasons expressed in this opinion, we conclude that section 39.467(4), Florida Statutes (1997), now section 39.809(4), Florida Statutes (2000), requiring mandatory closure of all hearings in termination of parental rights (TPR) proceedings is valid under the United States and Florida constitutional provisions respecting access of the public and media to judicial proceedings. Accordingly, we answer the certified question in the affirmative.

FACTS

The Department of Children and Family Services initially brought an action seeking a declaration that J.B., a minor child, was dependent and in need of care. The State alleged that the mother of the child suffers from Munchausen by Proxy Syndrome and intentionally caused her minor child to become so ill that she required numerous hospitalizations. Under section 39.507, Florida Statutes (1999), the adjudicatory hearing on a State's petition for dependency is required to be open to the public unless the judge orders the hearing closed upon determining that the public interest or the welfare of the child is best served by so doing.[1] The parents moved

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1. Section 39.507(2), Florida Statutes (1999), provides:

> (2) All hearings, except as provided in this section, shall be open to the public, and a person may not be excluded except on special order of the judge, who may

(Cont'd)

to close the dependency proceedings and to enjoin all concerned from releasing information about the proceeding to anyone, arguing that it was against the child's best interests to be exposed to the press and media. The parents also filed a motion to impose a "gag" order to prohibit the release of any information. The trial court eventually denied the motions but without prejudice to the parents to move to close any further proceedings.

At some point, the State moved to permanently terminate parental rights. Because the character of the proceedings changed to a TPR proceeding, the requirements of section 39.467, Florida Statutes (1997),[2] became controlling. This statute provides in part: "All hearings involving termination of parental rights are confidential and closed to the public."[3]

(Cont'd)

> close any hearing to the public upon determining that the public interest or the welfare of the child is best served by so doing. The parents or legal custodians shall be allowed to obtain discovery pursuant to the Florida Rules of Juvenile Procedure, provided such discovery does not violate the provisions of s. 39.202. Hearings involving more than one child may be held simultaneously when the children involved are related to each other or were involved in the same case. The child and the parents, caregivers, or legal custodians of the child may be examined separately and apart from each other.

2. *See* § 39.809(4), Fla. Stat. (2000).

3. Section 39.809(4), Florida Statutes (1999), provides:

(Cont'd)

The parents then changed their position and alleged that the mandatory closure required by the TPR statute is unconstitutional and violates the Sixth and Fourteenth Amendments to the United States Constitution. They allege here that the statute violates both the United States and Florida Constitutions.[4]

The trial court declared section 39.467(4) facially overbroad and unconstitutional. The trial court reasoned that TPR proceedings should be treated like criminal prosecutions since the parents in a TPR proceeding face grave consequences. The trial court noted that the dependency proceedings were open as required by the dependency statute, and there had already been extensive media coverage.

The State filed a petition for certiorari, and the Fourth District quashed the trial court's order. The Fourth District began its analysis with the following "well-worn principles of constitutional adjudication":

(Cont'd)

> (4) All hearings involving termination of parental rights are confidential and closed to the public. Hearings involving more than one child may be held simultaneously when the children involved are related to each other or were involved in the same case. The child and the parents may be examined separately and apart from each other.

4. "In all criminal prosecutions, the accused shall enjoy the right to a . . . public trial. . . ." U.S. Const. amend. VI. "In all criminal prosecutions the accused shall, upon demand . . . have a . . . public trial. . . ." Art. I, § 16(a), Fla. Const.

Appendix A

> Statutes are presumed to be valid and not unconstitutional. Courts are required to concede every presumption in favor of the validity of a statute. One who challenges the constitutionality of a statute has the burden of demonstrating its invalidity. Only a clear and demonstrated usurpation of power will authorize judicial interference with legislative action. It is therefore the duty of an appellate court to uphold the validity of a statute in all cases where that result can be lawfully reached.

Department of Children & Family Services v. Natural Parents of J.B., 736 So. 2d at 113-14 (citations omitted). With those initial guidelines, the Fourth District held that the parents failed to meet their heavy burden of demonstrating the invalidity of this statutory provision. The Fourth District focused primarily on the Sixth Amendment and rejected the trial court and parents' criminal model for TPR proceedings. In so doing, the Fourth District refused to extend Sixth Amendment rights of the criminally accused, including the right to a public trial, to parents in TPR proceedings. The Fourth District added further that the Legislature has set the public policy of the state by including the mandatory closure language in the statute, that mandatory closure of TPR proceedings is consistent with other proceedings involving juveniles, and that mandatory closure falls within the exceptions to the general policy of openness enunciated in *Barron v. Florida Freedom Newspapers, Inc.*, 531 So. 2d 113 (Fla. 1988). We agree with the decision and rationale of the Fourth District.

Appendix A

Closed Court Presumption in Juvenile Proceedings

Petitioners advocate that a presumption of openness should be extended to TPR proceedings which, they argue, can only be overcome if the court determines on a case-by-case basis that the best interest of the child outweighs the public's right of access to the proceedings and that any such order of closure should be narrowly tailored to that end. "[I]n determining whether a particular proceeding is presumptively open, the Court examines whether the place and process have historically been open to the press and public and whether public access plays a significant role in the functioning of the process." *In re N.H.B.* 769 P.2d 844, 847 (Utah Ct. App. 1989) (citing *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986)). Petitioners present the lengthy history and rationale of the open court presumption in criminal cases. We agree with petitioners that criminal matters are traditionally open proceedings. However, we do not agree that the presumption of openness in criminal proceedings is or should be extended to juvenile proceedings.

The foundation of the juvenile system is to " 'preserv[e] and promot[e] the welfare of the child,' which makes a juvenile proceeding fundamentally different from an adult criminal trial." *Schall v. Martin*, 467 U.S. 253, 263 (1984) (citation omitted). Although juvenile proceedings are civil proceedings, *Ostrum v. Department of Health & Rehabilitative Services*, 663 So. 2d 1359 (Fla. 4th DCA 1995), and although the presumption of openness has generally been extended to civil proceedings, juvenile proceedings have historically been closed to the public in furtherance of the overriding interest in, among other things, protecting the child from stigma, publicity, and embarrassment and promoting rehabilitation.

Appendix A

> It is a hallmark of our juvenile justice system in the United States that virtually from its inception at the end of the last century its proceedings have been conducted outside of the public's full gaze and the youths brought before our juvenile courts have been shielded from publicity. See H. Lou, Juvenile Courts in the United States 131-133 (1927); Geis, Publicity and Juvenile Court Proceedings, 30 Rocky Mt.L.Rev. 101, 102, 116 (1958).

Smith v. Daily Mail Pub. Co., 443 U.S. 97, 107 (1979) (Rehnquist, J., concurring). All fifty states have some form of shield law to limit public access to proceedings involving juveniles. *Id.* at 99. We have found no case that holds that the presumption of openness is a constitutional requirement in the context of juvenile proceedings. Indeed, the history of the juvenile justice system indicates the contrary, that it is in the best interest of the child to protect the child from publicity in certain proceedings and that this protection outweighs the public's right to access. We do not agree with petitioners that in TPR proceedings a presumption of openness is constitutionally required. A presumption that juvenile proceedings be closed to the public is consistent with the history and tradition of the juvenile justice system and furthers the sound and practical purposes of that system.

Mandatory Closure

Petitioners argue that closing court proceedings to the public is constitutional only if there is a compelling government interest to do so and only if closure is narrowly

tailored to further that interest. While petitioners do not dispute the compelling government interest in confidential juvenile proceedings, they do argue that mandatory or per se closure of juvenile proceedings is not narrowly tailored.

Only in those proceedings found to be presumptively open, however, is it necessary for the court to make specific findings "demonstrating that 'closure is essential to preserve higher values and is narrowly tailored to serve that interest.' " *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 13-14 (1986) (quoting *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984)). Thus, where there is no presumption of openness, there is no need for specific findings demonstrating that closure is essential and narrowly tailored. Because there is no presumption of openness in TPR proceedings, a mandatory closure requirement does not unconstitutionally limit the public's right of access to the proceedings. Thus, mandatory closure of proceedings that have no presumption of openness is constitutionally valid.

Petitioners rely heavily on *Barron v. Florida Freedom Newspapers*, 531 So. 2d 113 (Fla. 1988). In *Barron*, we held that there is a strong presumption of openness in both criminal and civil proceedings and we relied in part upon *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 n.17 (1980), wherein Chief Justice Burger stated: "[H]istorically both civil and criminal trials have been presumptively open." As we do herein, in *Barron* we considered the history and tradition of open proceedings in the civil context. In so doing, we recognized certain exceptions to the presumption of openness in judicial proceedings. We set forth certain factors to be considered by courts before closing certain civil

proceedings, and held that closure of certain proceedings should occur when necessary

> (a) to comply with established public policy set forth in the constitution, statutes, rules or case law; (b) to protect trade secrets; (c) to protect a compelling governmental interest [e.g., national security; confidential informants]; (d) to obtain evidence to properly determine legal issues in a case; (e) to avoid substantial injury to innocent third parties [e.g., to protect young witnesses from offensive testimony; to protect children in a divorce]; or (f) to avoid substantial injury to a party by disclosure of matters protected by a common law or privacy right not generally inherent in the specific type of civil proceeding sought to be closed.

Barron, 531 So. 2d at 118. Most importantly, however, in *Barron*, we recognized that the Florida Legislature expressly made certain proceedings confidential by statute as a matter of public policy, *id.* at 119, and we specifically excepted such proceedings from the presumption of openness. By the time this Court decided *Barron* in 1988, we had already upheld the constitutionality of the mandatory closure statute in adoption proceedings. *In re Adoption of H.Y.T.*, 458 So. 2d 1127 (Fla. 1984). Our decision today is consistent with our decision in *Barron*. Approving the Fourth District and upholding the constitutionality of section 39.809(4) complies with established public policy set forth in the statutes and case law and is consistent with the historical and traditional presumption of closed juvenile proceedings.

Appendix A

TPR proceedings are not the only proceedings the Florida Legislature has required by statute to be closed as a matter of public policy. Adoptions (section 63.162, Florida Statutes (1999)), actions establishing parental status in situations of gestational surrogacy (section 742.16, Florida Statutes (1999)), and hearings for appointment of a guardian ad litem (section 29.827, Florida Statutes (1999)), are also required to be closed proceedings.[5] There are other situations where the court is given discretion to close the proceedings, such as in the case of paternity actions (section 742.031, Florida Statutes (1999)). As stated above, this Court upheld the constitutionality of mandatory closure for adoption proceedings in *In re Adoption of H.Y.T.*

In *H.Y.T.*, the press, like the parents in this case, challenged the mandatory closure of adoption proceedings, arguing that the mandatory nature of the closure was overbroad and a violation of the First Amendment right to public access. We held that the best interest of the child and the public policy of protecting the parties' privacy in adoption proceedings outweighed the interest the public might have in having access to the proceedings. We further noted that in such proceedings, the court itself takes an interest in the case and serves to protect the best interest of the child. This is a departure from the court's typical disinterested position. The Second District followed the rationale of *H.Y.T.*, when it declared a similar statute mandating the closure of certain dependency proceedings to be constitutional. *See Mayer v. State*, 523 So. 2d 1171 (Fla. 2d DCA 1988).

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5. This list is not exhaustive.

Appendix A

Petitioners argue that adoptions differ from TPR proceedings because TPR proceedings are adversarial in nature whereas adoptions are not. While the parents in a TPR proceeding may perceive the dissolution of their parental rights as a sanction, the purpose of the TPR proceeding is not to punish the parents. The paramount concern of the Court and the Legislature is the health and safety of the child or children involved. *See* § 39.001(1)(b)(1), Fla. Stat. (1999). Because of this overriding concern, the mandatory closure of certain proceedings involving children is not an unconstitutional limitation on First Amendment freedoms.

Consistency with Other Statutes

Petitioners argue that the statute's intended purpose is undermined by the fact that there is no mandatory closure provision in the statute providing the procedure for adjudication of dependency actions. Petitioners argue that most TPR proceedings are initiated as dependency cases. If there is no closure order at the dependency phase, there may already have been significant publicity by the time TPR proceedings are instituted. Petitioners argue that the better view would be a presumptively open proceeding that is only closed after a particularized showing is made that such closure is justified. This argument was asserted in *H.Y.T.* We did not find this argument compelling then, and do not find this argument compelling now. We do not believe the Legislature intended that the child bear the burden of proving the need for confidentiality in TPR proceedings, which is why the Legislature removed the discretion from the court. As we held in *H.Y.T.*, petitioners' argument "attempts to lay on the shoulders of the child the burden of proving a need

for the protection the people of the state, through the legislature, have attempted to afford parties to an adoption." *H.Y.T.*, 458 So. 2d at 1129.

Inconsistent though the dependency and TPR statutes may be, neither is unconstitutional.

> Where a statute does not violate the federal or state Constitution, the legislative will is supreme, and its policy is not subject to judicial review. The courts have no veto power, and do not assume to regulate state policy; but they recognize and enforce the policy of the law as expressed in valid enactments, and decline to enforce statutes only when to do so would violate organic law.

City of Jacksonville v. Bowden, 64 So. 769, 772 (1914).

Conclusion

We approve the decision of the Fourth District and answer the certified question in the affirmative. Section 39.467(4), now section 39.809(4), Florida Statutes (2000), requiring mandatory closure of all hearings in TPR proceedings, is valid under the United States and Florida constitutional provisions respecting access of the public and media to judicial proceedings. There is no constitutional requirement that juvenile proceedings be presumptively open to the public. The Legislature has validly declared that the public policy of the State requires the mandatory closure of TPR proceedings. Because there is no presumption of openness in juvenile proceedings, and because none is

constitutionally required, there is no requirement that an order of closure be made only after a case-by-case determination. Petitioners have failed to meet their heavy burden to overcome the presumption in favor of the validity of the statute and have failed to demonstrate that the statute clearly and unconstitutionally usurps the public's right of access to TPR proceedings.

It is so ordered.

WELLS, C.J., and SHAW, HARDING and LEWIS, JJ., concur.

ANSTEAD, J., dissents with an opinion, in which PARIENTE, J., concurs.

PARIENTE, J., dissents with an opinion, in which ANSTEAD, J., concurs.

* * *

Appendix A

ANSTEAD, J., dissenting.

While I agree with the majority that the press and public do not have a qualified right of access to termination proceedings, I cannot agree to approving a provision for mandatory closure for all such proceedings without conducting a full constitutional analysis. I believe the better approach would be to take the statute as creating a presumption in favor of closure but permitting the trial court to consider all relevant circumstances, and then balance the competing interests in such cases before closure may be ordered.

The majority begins its analysis by finding that juvenile proceedings have been historically closed to the public, and therefore no qualified right of access exists for the termination of parental rights proceedings. However, the majority then makes a giant leap in concluding that a *mandatory* closure of termination proceedings is constitutionally valid:

> [W]here there is no presumption of openness, there is no need for specific findings demonstrating that closure is essential and narrowly tailored. Because there is no presumption of openness in TPR proceedings, a mandatory closure requirement does not unconstitutionally limit the public's right of access to the proceedings. Thus, mandatory closure of proceedings that have no presumption of openness is constitutionally valid.

Majority Opinion at 8-9. In my view, such a summary analysis is incomplete. In other words, just because juvenile

proceedings focusing on the dependency or delinquency of the juvenile have been historically closed does not automatically permit the *mandatory* denial of public access to other, distinct court proceedings where the conduct of adult parents is the focus and the rights of those parents are being adjudicated on a permanent basis.

In fact, other states have considered this precise issue and concluded that a mandatory rule cannot withstand constitutional scrutiny even when applied to juvenile proceedings. For example, in *Florida Publishing Co. v. Morgan*, 322 S.E.2d 233 (Ga. 1984), the Georgia Supreme Court held that mandatory closure of juvenile delinquency proceedings was unconstitutional. *See id.* at 238. There, the issue before the court was whether a statute which *required* that all juvenile court hearings be closed to the public was constitutional. *See id.* at 235. Like the majority opinion in this case, the Georgia Supreme Court found that juvenile proceedings have historically been presumptively subject to closure. However, the Georgia Supreme Court declined to conclude that mandatory closure was constitutional:

> The holdings [of the United States Supreme Court] create a presumption that criminal trials will be open to the public. As we have previously stated, part of the rationale of these holdings is that, at English common law and in Colonial America, trials have been open to the public for reasons which, throughout history, have fostered and continue to foster a role for the judiciary appropriate to our scheme of constitutional government.

> However, in their relatively brief history, it would appear that juvenile proceedings have been closed to the public. Therefore, we are unable to conclude that there is any historically-based constitutional presumption of openness applicable to juvenile-court proceedings. This, however, does not mean that the absolute closure of juvenile-court hearings passes constitutional muster.
>
> From the various cited cases, we conclude that, consistent with the Constitution, the state may create a rule that delinquency, deprivation, and unruliness hearings in juvenile court are presumed closed to the public (and press). However, *for constitutional reasons, this presumption cannot be conclusive.* The public and/or press must be given an opportunity to show that the state's or juveniles' interest in a closed hearing is not "overriding" or "compelling."
>
> . . . .
>
> We, therefore, hold that where a member of the public or press institutes a judicial proceeding to require the opening of a juvenile hearing, the court must in an expeditious manner give the public or press an opportunity to present evidence and argument to show that the state's or juveniles' interest in a closed hearing is overridden by the public's interest in a public hearing.

Id. at 237-38 (emphasis added); *see also In re N.H.B.*, 769 P.2d 844, 852 (Utah Ct. App. 1989) (holding that the

presumption of closure of juvenile proceedings is not irrebuttable because of constitutional considerations).

Similarly, the Supreme Court of New Jersey has held that although juvenile proceedings are presumed closed, it does not "equate with a mandatory rule" of closure:

> The compelling state interest in protecting victims of child abuse from the embarrassment of testifying in an open courtroom, with the attendant possibility of media coverage, justifies a presumption that [child neglect and abuse] proceedings initiated under Title 30 or Title 9 will be closed to the public. *The presumption of closure does not, however, equate with a mandatory rule.* Members of the public, including the press, must be free to make application to the trial court to be permitted to attend [these] proceedings. Under those circumstances, the court must balance the public's right of access to judicial proceedings against the State's interest in protecting children from the possible detrimental effects of revealing to the public allegations and evidence relating to parental neglect and abuse.

New Jersey Div. of Youth & Family Servs. v. J.B., 576 A.2d 261, 269 (N.J. 1990) (emphasis added).[6] I believe that the

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6. Other courts have fashioned standards to be applied by trial courts when determining whether to admit the press and public in juvenile proceedings. *See, e.g., San Bernardino County Dep't of Pub. Soc. Servs. v. Superior Court*, 283 Cal. Rptr. 332, 345 (Cont'd)

balancing test developed by these courts and others is the better approach for evaluating the closure issue presented here consistent with the United States Supreme Court precedent on this issue.

Indeed, this Court has recognized and applied a similar balancing approach in evaluating the closure of judicial proceedings. In *Barron v. Florida Freedom Newspapers, Inc.*, 531 So. 2d 113 (Fla. 1988), for example, in the domestic litigation context, we stated that "a strong presumption of openness exists for *all* court proceedings." *Id.* at 118 (emphasis added). We stressed that before ordering closure, "the trial court shall determine that no reasonable alternative is available to accomplish the desired result, and, if none exists, the trial court must use the least restrictive closure necessary to accomplish its purpose." *Id.*[7] *Barron* provides a basic framework for analysis that can be applied here.

(Cont'd)
(Cal. Ct. App. 1991) (finding that the press should be allowed access to juvenile proceedings unless there is a reasonable likelihood that access would be harmful to the child's best interest); *In re T.R.*, 556 N.E.2d 439, 451 (Ohio 1990) (finding that the trial court must determine that there is a reasonable and substantial belief that the child will be harmed, and that the harm outweighs the benefits of public access before closing a juvenile proceeding). The Ohio Supreme Court has recognized that "[a] proper standard is one which gives due deference to both the limitations of our ability to predict harmful consequences which may result from public access and the public's interest in learning about and scrutinizing the working of the juvenile court." *In re T.R.*, 556 N.E.2d at 451.

7. In so holding, this Court noted that the Florida Legislature had expressly made adoptions, paternity and juvenile proceedings confidential. *See id.* at 119.

Appendix A

It is true that this Court has upheld the constitutionality of a statute which mandated closure of adoption proceedings. *See In re Adoption of H.Y.T.*, 458 So. 2d 1127, 1129 (Fla. 1984). While this Court in *H.Y.T.* did not articulate a definitive balancing test in our opinion, it is apparent that in our analysis and resolution of the case we clearly weighed the press's right of access to the courts against the state's interest in protecting the child. We reasoned that adoption proceedings are "qualitatively different from other judicial proceedings" because the court's primary duty is to protect the best interests of the child. *See id.* at 1128. We further found that the media's freedom was only minimally impaired, and that the impairment only affected matters of limited newsworthiness rather than matters of genuine public concern. *See id.* at 1129.

The majority opinion here recognizes that in *H.Y.T.* we weighed the best interests of the child against the public interest in adoption proceedings, yet the majority fails to include in its analysis a consideration of the parents' or the public's interest in these termination proceedings. Rather, without so much as a mention of the parents' or the public's right of access to the courts, or the fact that other proceedings involving the same issues may be open, the majority simply concludes that the state's interest in protecting the child is an "overriding concern" and thus mandatory closure "is not an unconstitutional limitation on First Amendment freedoms." Majority Opinion at 11. To hold as the majority does without at least considering the competing interests and other relevant circumstances ignores our constitutional precedent.

We cannot ignore that there are strong policy concerns which support open proceedings and that Florida public policy and law has traditionally favored open proceedings. One valid factor to be considered here would be the extent to which the proceedings and the evidence to be produced have already been disclosed to the public. In addition, the severity and finality of the relief sought by the State against the parents is obviously a valid factor to be considered and weighed. "[P]arental termination decrees are among the most severe forms of state action." *M.L.B. v. S.L.J.*, 519 U.S. 102, 128 (1996). In this regard, some courts recognize that public access to termination proceedings may logically be invoked as a check against abuse of judicial and governmental power. *See San Bernardino County Dep't of Pub. Soc. Servs.*, 283 Cal. Rptr. at 341 ("Public access does serve as a check against judicial and governmental abuse or misuse of power which might result in unnecessary and unjust interference with [a parent's constitutional right to raise and educate his or her child]."[8]; *In re N.H.B.*, 769 P.2d at 849. The parents contend that it is patently unjust and an appearance of unfairness to take a parent's child away forever in secret proceedings. Indeed, some contend that without openness, even traditional

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8. Despite this acknowledgment, the California Court of Appeal held that the First Amendment right of access to the courts does not extend to juvenile proceedings. *See id.* at 343. Nevertheless, the court left to the trial court's discretion the decision of whether to allow public access to juvenile proceedings. *See id.* at 345. In making this determination, the trial court must weigh the social values gained from public access against the best interests of the minor child. *See id.* After weighing these factors, the court held that the trial court should allow public access "unless there is a reasonable likelihood that such access will be harmful to the child's or children's best interest" in the case. *Id.*

juvenile proceedings "have the potential to become 'little more than kangaroo courts, where judges rubber-stamp agency requests.' " Jan L. Trasen, *Privacy v. Public Access to Juvenile Court Proceedings: Do Closed Hearings Protect the Child or the System?*, 15 B.C. Third World L.J. 359, 362 (1995) (quoting Sandy Bauers, *Fighting to Lift Veil on Child Welfare*, Philadelphia Inquirer, Aug. 15, 1993, at E1).[9]

Finally, Trasen suggests that without public scrutiny, neither parents nor the public would have recourse against incompetence or carelessness of caseworkers. *See id.* at 381-83. Hence, without some protection during the course of the juvenile proceedings, including the benefit of public scrutiny, the action of the State may go uncorrected. In other words, if such proceedings are mandatorily closed, there will be little or no check on caseworkers or their decisions.[10]

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9. Thus, it is not surprising that some courts have recognized that public access to the courts may play a significant role in the functioning of the juvenile system. *See San Bernardino County Dep't of Pub. Soc. Servs.*, 283 Cal. Rptr. at 342; *see also* Trasen, *supra*, at 381 (noting that public access can serve an important function by raising community awareness and involvement in the juvenile courts). The California Court of Appeal acknowledged that to the extent that open proceedings lead to more accurate fact finding, public access serves a vital and beneficial role in juvenile proceedings. *See San Bernardino County Dep't of Pub. Soc. Servs.*, 283 Cal. Rptr. at 341.

10. Further, some have claimed that without public scrutiny, parents of low means, especially, may have little chance of protecting their rights against mistaken allegations and the power of the State. In fact, some parents have looked to the media in an effort to even the

(Cont'd)

See generally In re N.H.B., 769 P.2d at 849 (acknowledging that publicity of juvenile court system would "promote public involvement in the governmental processes and might deter inappropriate actions on the part of some participants").

While I recognize that public access to termination proceedings must be carefully considered due to the sensitive nature of the dispute, the potential harm to the children in any given case is almost always complex and difficult to analyze and predict. Further, while closure may frequently result, the interests of the parents and the public should, at a minimum, be considered before any decision is made on whether the proceedings should be closed. Based on the policy and constitutional considerations set out above, I conclude that the statute at issue here should not be construed to provide mandatory closure merely because juvenile proceedings have been historically closed to the public. Rather, in my view the sounder approach would be to construe the closure statute as creating a presumption in favor of closure, while still permitting courts to determine access on a case-by-case basis.

PARIENTE, J., concurs.

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playing field. *See generally* Trasen, *supra*, at 378 (citing *Ernst v. Children & Youth Servs.*, 1993 WL 343375 (E.D. Pa. 1993), *aff'd in part, rev'd in part*, 108 F.3d 486 (3d Cir. 1997), where the grandmother sought media attention in an effort to expose the shortcomings of the child welfare agency and the judicial process). Trasen also points to *In re T.R.*, where the mother turned to the media in an effort to protect her children because she lacked the money, power, and position to litigate against the agency. *See* Trasen, *supra*, at 378.

PARIENTE, J., dissenting.

I concur with Justice Anstead's view that a mandatory closure requirement in termination of parental rights proceedings, under the circumstances of this case in particular, may be constitutionally infirm. As we underscored in *Barron,* "the court must balance the rights and interests of the parties to the litigation with those of the public and press." *Barron v. Florida Freedom Newspapers*, 531 So. 2d 113, 118 (Fla. 1988). Further, although termination of parental rights ("TPR") proceedings are not criminal proceedings, TPR proceedings constitute state-initiated actions that implicate fundamental liberty interests protected by the Fourteenth Amendment. *See generally M.L.B. v. S.L.J.*, 519 U.S. 102 (1996); *Santosky v. Kramer*, 455 U.S. 745 (1982).

Under the present statutory scheme, there is a presumption of openness that governs dependency proceedings. Only when the focus shifts to the permanent and irrevocable termination of the parents' constitutionally protected rights does the mandatory closure provision apply, raising a question of the logic and fairness of the current statutory scheme. The result is that every TPR proceeding is closed, without a requirement of a weighing of the interests involved.

If statutorily mandated closure is prompted by the best interest of the child, then it does not appear logical for the closure to become mandatory only after the dependency proceeding — when the focus shifts to whether the parents' rights should be terminated. As the trial court in this case

noted, some dependency proceedings are open to the public, and often involve "much of the same information" as TPR proceedings. *Department of Children & Family Servs. v. Natural Parents of J.B.*, 736 So. 2d 111, 113 (Fla. 4th DCA 1999). I do not then understand how the best interests of the child are served by closing the proceedings only after the focus of the proceedings turns to the termination of the parents' rights.

I also question the assumption underlying the majority opinion that all juvenile proceedings in this State historically have been closed to the public. *See* majority op. at 7. The term "juvenile proceedings" broadly encompasses both juvenile dependency and juvenile delinquency proceedings. *See generally* Fla. R. Juv. P., Pt. I (Delinquency Proceedings); Pt II (Dependency and Termination of Parental Rights Proceedings).

Only fifty years ago, the Legislature enacted chapter 39, Florida Statutes (1951), generally known as the Juvenile Court Act. *See* ch. 26880, Laws of Fla. (1951). At that time, this legislation made no distinction between dependency proceedings and TPR proceedings. Section 39.09, which applied to all juvenile proceedings, provided in part:

> Only the child involved in the case, the parents or legal custodians of the child, their attorneys, and such other persons *as they may request or the judge may direct*, shall be permitted to be present.

§ 39.09(2), Fla. Stat. (1951) (emphasis added). Although section 39.09 underwent a series of legislative changes over

the years, I find it significant from a historical perspective that, at least fifty years ago, there was no mandatory closure of chapter 39 proceedings in this State and that instead, the judge determined the extent of the closure.

Moreover, the majority acknowledges that even at the present time not all juvenile proceedings under chapter 39 are closed. *See* majority op. at 12. Significantly, there is a statutory presumption of openness in dependency proceedings subject to a judicial decision to "close any hearing to the public upon determining that the public interest or the *welfare of the child* is best served by so doing." § 39.507(2), Fla. Stat. (Supp. 1998) (formerly section 39.408(2)(c)) (emphasis added). Dependency proceedings are the necessary predicate to TPR proceedings. However, section 39.809(4), Fla. Stat. (Supp. 1998) (formerly section 39.467(4)), provides for mandatory closure of all hearings involving the termination of parental rights — without regard to whether the preceding dependency action was open or closed.

This case highlights the fallacy of the bifurcated statutory scheme in its present form, in which dependency proceedings are presumptively open, yet TPR proceedings are mandatorily closed. Because the dependency portion of the proceeding in this case was open to the public, extensive media attention already existed.[11] *See id.* at 113. The trial court found that the TPR proceedings should be open in this

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11. Ironically, the trial court opened the dependency proceeding against the wishes of the parents, who sought to have the dependency proceeding closed for fear of "leaks and gossip." *Parents of J.B.*, 736 So. 2d at 112.

case. The trial court "specifically took notice of the extensive media attention to which this case has already been subjected and concluded that the prior media scrutiny 'severely undermines any privacy interests the state or the minor child might have.' " *Id.*

Because of the extensive publicity that already occurred due to the open dependency proceedings,[12] it is difficult to envision how mandatory closure at this stage of the proceedings would promote the best interests of the child. Further, the parents, whose rights were being terminated, affirmatively requested that the TPR proceedings remain open.

For all these reasons, in order to pass constitutional muster under our decision in *Barron*, the decision to close TPR proceedings should be vested in the sound discretion of the trial court on a case-by-case basis, just as it is in dependency proceedings. An appropriate balance must be struck among the many interests to be considered — the potential harm to the child, the rights of the parents, the right of public access and the promotion of fairness and public confidence in the judicial system.

ANSTEAD, J., concurs.

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12. Apparently there were also criminal proceedings involving the same allegations that were also open to the public.

APPENDIX B — OPINION OF THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FOURTH DISTRICT DATED AND FILED JUNE 23, 1999

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT

JANUARY TERM 1999

CASE NO. 98-2255

DEPARTMENT OF CHILDREN AND FAMILY SERVICES, STATE OF FLORIDA,

Petitioner,

v.

THE NATURAL PARENTS OF J.B.,

Respondents.

Opinion filed June 23, 1999

Petition for Writ of Certiorari to the Circuit Court for the Seventeenth Judicial Circuit, Broward County, Thomas M. Lynch, IV, Judge, L.T. Case No. 98-3346 35.

* * *

Appendix B

FARMER, J.

The issue in this termination of parental rights (TPR) proceeding is whether a Florida statute closing all hearings throughout the case to the public and media, requiring instead that the case be adjudicated behind closed courthouse doors, is unconstitutional. We uphold the statute and conclude that the state has the power to close such hearings, grant certiorari and quash the order of the circuit court.

The underlying facts of the case and the issues they have spawned are of only marginal import to today's question, but we shall set the scene. Currently pending are criminal cases against the parents for child abuse and also the present case to end their parental rights. The basis of the state's cases is not the more familiar kind of child abuse in which parents negligently fail to provide ordinary care, food, health care and housing. Instead, the state has alleged that these parents intentionally caused their 11-year old daughter to become ill enough to be repeatedly hospitalized. We are not called upon at this time to pass upon the merits of the case. Our only concern today is whether the entire TPR proceeding can validly be closed.

DCFS initially brought this civil action against the natural parents to have their child declared dependent and in need of care. The parents in turn moved to close the dependency proceedings and to enjoin all concerned from releasing information about the proceeding to anyone. They argued that it was against the child's interests to be exposed to the press and media and that it was in the best interests of the child that the proceedings be closed. At that point, DCFS

took no stance on the closure issue, while the child's guardian supported it. A psychologist who had treated the child also opined that it was "imperative" that the dependency proceedings be closed and that the case be discussed only in the courtroom. In later hearings, a pediatric expert thought that a videotape deposition of the child would be very damaging. Also later the parents filed a second motion to impose a "gag" order to prohibit the release of any information, especially referring to leaks and gossip. In time, the trial court denied the motion to close court proceedings but without prejudice to the parents to move to close any later proceeding in the case if ongoing media coverage required the court to reconsider its ruling at a later date. The court also denied the motion for the gag order without prejudice.

Sometime thereafter, DCFS decided to change the character of the proceeding from a dependency case and filed motions to terminate the parental rights of respondents. With the case thus amended to a TPR proceeding, the requirements of section 39.467 came into effect.[1] That statute provides in part that "[a]ll hearings involving termination of parental rights are confidential and closed to the public." The parents response was, in part, to change their previous stance on closing the proceedings; they filed a motion to declare the statute invalid on the grounds that it violates the Sixth and Fourteenth Amendments to the United States Constitution. The effect of declaring the closing statute unconstitutional would be, of course, to open up the TPR hearings to the public and media.

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1. *See now* § 39.809(4), Fla. Stat. (Supp. 1998).

At the hearing on the motion, the parents likened TPR cases to criminal prosecutions and contended that, like criminal prosecutions,[2] TPR cases are subject to the imperative of being open to the public and media. They argued that the state should be required to show a compelling governmental interest in closing an entire TPR proceeding. DCFS responded by comparing these cases to some dependency and all adoption cases, for which Florida courts have found legislative closure valid.[3] The agency argued that unlike criminal prosecutions, where there is a specific constitutional right to open hearings, the primary concern of TPR cases is the best interests of children, interests which usually require closed hearings.

In reaching its decision on the constitutional question, the trial court accepted the proposition that TPR cases are to be treated like criminal prosecutions. Proceeding from that premise, the court stated that "any per se rule of closure for criminal proceedings is unconstitutional." Noting the supreme court's decision in *In re Adoption of H.Y.T.*, 458 So. 2d 1127 (Fla. 1984), the trial court contrasted TPR proceedings with adoptions, finding substantial differences:

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2. *See* U.S. CONST., amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a . . . public trial. . . ."); and Art. I, § 16(a), Fla. Const. ("In all criminal prosecutions the accused shall, upon demand . . . have a . . . public trial. . . .").

3. *See In re Adoption of H.Y.T.*, 458 So. 2d 1127 (Fla. 1984) (statute requiring closure in adoption cases is valid), and *Mayer v. State*, 523 1171 (Fla. 2d DCA 1988) (statute requiring closure of dependency proceedings not unconstitutional).

Appendix B

> "In adoption[s] . . . prospective parents are not in danger of losing any existing rights. In contrast, parents in [TPR] proceedings are faced with a far greater risk of loss. . .. '[F]ew consequences of judicial action are so grave as the severance of natural family ties.' "

Because the parents in a TPR proceeding face such grave consequences, the trial court reasoned that they "should have a right" to have the court determine whether the hearings should be public.

The trial court further noted that the legislature has now permitted some dependency proceedings to be public, *see* section 39.408(2)(c), and that such proceedings often precede TPR cases and "involve disclosure of much of the same information." The court concluded that open hearings in TPR cases would promote "fairness and public confidence in the judicial system." The trial court also specifically took notice of the extensive media attention to which this case has already been subjected and concluded that the prior media scrutiny "severely undermines any privacy interests the state or the minor child might have." The trial court therefore declared section 39.467(4) facially overbroad and thus unconstitutional.

We begin our analysis of the trial court's rationale and conclusion with some well-worn principles of constitutional adjudication. Statutes are presumed to be valid and not unconstitutional. *Gardner v. Johnson*, 451 So. 2d 477 (Fla. 1984). Courts are required to concede every presumption in favor of the validity of a statute. *Griffin v. State*, 396 So. 2d

152 (Fla. 1981). One who challenges the constitutionality of a statute has the burden of demonstrating its invalidity. *State v. Bussey*, 463 So. 2d 1141 (Fla. 1985) (burden is on challenger to demonstrate that law does not bear reasonable relationship to proper state objective). Only a clear and demonstrated usurpation of power will authorize judicial interference with legislative action. *Eastern Air Lines Inc. v. Department of Revenue*, 455 So. 2d 311 (Fla.), *appeal dismissed*, 474 U.S. 892 (1985). It is therefore the duty of an appellate court to uphold the validity of a statute in all cases where that result can be lawfully reached. *Horsemen's Benevolent and Protective Ass'n v. Division of Pari-Mutuel Wagering Department of Business Regulations*, 397 So. 2d 692 (Fla. 1981).

We turn first to the trial court's major premise, that TPR cases are indistinguishable from criminal prosecutions. We have had previous occasion to consider this very same premise. In *Ostrum v. Dep't of Health & Rehabilitative Services of the State of Florida*, 663 So. 2d 1359 (Fla. 4th DCA 1995), we addressed the contention that, because TPR cases are treated like criminal cases, counsel for a parent who concludes that no substantial appellate issue can be raised on appeal and who thus desires to withdraw must comply with the *Anders* procedure employed in criminal appeals.[4] In rejecting that premise, we said:

> "TPR cases are not criminal in nature. They are civil proceedings which happen to affect the substantial interests of the parents and children

4. *See Anders v. California*, 386 U.S. 738 (1967).

involved. Parents are entitled to appointed counsel at public expense in TPR proceedings. *In the Interest of D.B.*, 385 So.2d 83, 90-1 (Fla.1980) (due process clauses of U.S. and Florida constitutions require appointment of counsel for indigent parents when permanent termination of parental rights may result); *see also* § 39.465(1)(a), Fla. Stat. (1993) and Fla. R. Juv. P. 8.320. The right to counsel in *Anders* is based on the Sixth Amendment, but the right to counsel in TPR cases does not arise under the Sixth Amendment. *D.B.*, 385 So.2d at 89 ('Right to counsel in dependency proceedings, on the other hand, is governed by due process considerations, rather than the sixth amendment.').

"When a final order terminating parental rights has been entered, as in any civil case, the right to appeal is tempered by the record in the trial court: i.e. whether it contains any good faith possibilities for arguing error. If no error appears in good faith to appointed counsel, there does not appear any reason why counsel should not be able to seek permission to withdraw. The question is whether the full panoply of *Anders* procedures should attend the effort and further appellate consideration of the appeal.

"We think not. Apart from the fact that TPR cases are purely civil in nature as to which the right to counsel is based not on the Sixth Amendment, and that parental rights may be

ended for reasons other than criminal conduct, we think the interest of the children in quitting the uncertainties surrounding their future should be put to rest as soon as it can fairly be done. Hence we think it unnecessary to require the filing of a brief by counsel detailing the proceedings below with a discussion of where error might be suggested and why none actually appears. We similarly think it unnecessary for the three judge panel to give the full appellate consideration of the entire record below that *Anders* entails. *In re Anders Briefs*, 581 So.2d 149, 151 (Fla.1991) (appellate court has responsibility to conduct full independent review of record to discover arguable issues apparent on face of record).

"More importantly, however, *Anders* represents a radical departure from the traditional role of appellate judges as neutral decision makers without bias or prejudice for or against any party. Instead, it turns them into advocates for the party whose counsel seeks to withdraw. Whatever may be the rationale for requiring that departure from neutrality in criminal cases, we are quite unwilling to allow it in purely civil matters. To do so is to favor one class of litigants over the other. That circumstance will understandably be seen by other parties as a classic denial of equal protection of the law."

663 So. 2d at 1361. Our decision in *Ostrum* has since been approved and followed by other Florida District Courts of

Appeal. *See In the Interest of K.W.*, 24 Fla. L. Weekly D87, 1998 WL 889770 (Fla. 2nd DCA Dec. 23, 1998); *In re J.H.*, 693 So. 2d 723 (Fla. 5th DCA 1997), and *Jimenez v. Department of Health and Rehabilitative Services*, 669 So. 2d 340 (Fla. 3 DCA 1996).

The trial court here essentially gleaned its conclusion from the decisions of the United States Supreme Court in *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996), and *Santosky v. Kramer*, 455 U.S. 745 (1982). Obviously *Santosky* had already been decided at the time of our decision in *Ostrum* and we did not find anything in it suggesting the contrary to our conclusions in *Ostrum*. On the other hand, *M.L.B.* was decided after *Ostrum*, and the trial court could properly have thought that — if it indeed had the effect the trial court concluded it did — it displaced *Ostrum*. And so we turn to the more recent decision in *M.L.B.* to ascertain whether it holds all TPR proceedings to the procedures of criminal law.

In *M.L.B.*, the State of Mississippi conditioned a mother's right to appeal the severance of her maternal rights on prepayment of all appellate costs including the transcript. The Mississippi Supreme Court denied her petition to proceed without prepayment, saying that the right to proceed without prepayment of costs in Mississippi applies only at the trial level. On certiorari review of that decision, the United States Supreme Court held that, just as a state may not block an indigent petty offender's access to appellate review afforded generally to others, so also a state may not on account of poverty deny appellate review to a parent whose rights with her children have been terminated.

Appendix B

The Court restated the principle that "[c]hoices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as 'of basic importance in our society,' rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect." 519 U.S. at 116. *See Boddie v. Connecticut*, 401 U.S. 371 (1971) (prepayment of fees for divorce); *Turner v. Safley*, 482 U.S. 78 (1987) (right of inmate to marry); *Zablocki v. Redhail*, 434 U.S. 374 (1978) (right of parent to marry); *Loving v. Virginia*, 388 U.S. 1 (1967) (marriage); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942) (procreation); and *Meyer v. Nebraska*, 262 U.S. 390 (1923) (raising children). The Court recalled that the importance of the relationship between parents and children had underlain its decisions affording a parent a partial right to the appointment of counsel and heightening the state's burden of proof in TPR cases. *See Lassiter v. Department of Social Services*, 452 U.S. 18 (1981) (appointment of counsel for indigent parents in TPR cases not routinely required by Constitution but only on case-by-case basis), and *Santosky v. Kramer*, 455 U.S. 745 (1982) (clear and convincing proof standard is constitutionally required in TPR case).

At the same time, the Court pointed out that in *Griffin v. Illinois*, 351 U.S. 12 (1956), it had held that once a state affords a right of appeal from a criminal conviction it may not deprive a defendant of access to appellate review by requiring that the appellant procure a transcript at his own expense. The Court also found significant its decision in *Mayer v. Chicago*, 404 U.S. 189 (1971), where the Court had held that a state may not limit free transcripts to only

appeals of convictions where the defendant faces incarceration. There was also a narrow category of civil cases in which the Court had held that state must provide access to its *civil* judicial processes without regard to a party's ability to pay court costs and fees. *See Boddie*, 401 U.S. 371.

Because of the primacy of the parent-child relationship, the Court concluded that *Mayer* pointed to the proper disposition of the issue: i.e., that the severance of the mother's family ties with her children required that the access to appellate review be treated like petty offense appeals in which a state may not withhold a transcript needed for meaningful review. As with a petty offender, the stakes for the mother were grave because termination of the parental relationship is "irretrievably destructive of the most fundamental family relationship." 519 U.S., at 121. It would be anomalous to hold that a petty offender is entitled to a transcript but not counsel at state expense, but that a parent whose family ties are subject to severance may be denied a transcript but provided a lawyer at state expense if the issues are sufficiently complex. 519 U.S., at 123. The Court concluded that "decrees forever terminating parental rights" must be placed "in the category of cases in which the State may not 'bolt the door to equal justice.' " 519 U.S., at 124.

Nearing the end of its analysis, the Court stated that it has "repeatedly noticed what sets parental status termination decrees apart from mine run civil actions, even from other domestic relations matters such as divorce, paternity, and child custody." 519 U.S., at 127. In the Court's concluding words:

> "termination decrees work a unique kind of deprivation. In contrast to matters modifiable at the parties will or based on changed circumstances, termination adjudications involve the awesome authority of the State to destroy permanently all legal recognition of the parental relationship. Our . . . decisions recognizing that parental termination decrees are among the most severe forms of state action . . . have not served as precedent in other areas. We are therefore satisfied that *the label 'civil'* should not entice us to leave undisturbed the Mississippi courts' disposition of this case." [emphasis supplied; citations and some quotation marks omitted]

519 U.S., at 127-128.

It is abundantly clear that the foundation of *M.L.B.* is the Court's concern for equal and meaningful access to judicial processes, especially where the subject of the judicial proceeding is an interest as fundamental and critical as the family relationship. Where an interest rises to the unusual importance of parental ties, the judicial process due must be such that the final result is reliable, that the risk of error is minimized by the procedures used. Denying a parent access to an appellate remedy reduces the likelihood that the result will be reliable and correct, and it inhibits society's confidence that, because the procedures were fair and effective to that end, the right result was reached. Hence, our own analysis of *M.L.B.* makes clear that the Court has not required that TPR cases be treated like criminal prosecutions in all respects, and certainly not with regard to public closure of such proceedings.

So too with the parents reliance on *Globe Newspaper Co. v. Superior Court for the County of Norfolk*, 457 U.S. 596 (1982). As Justice O'Connor said in her concurring opinion about the decision in *Globe Newspaper*:

> "In *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 100 S. Ct. 2814, 65 L.Ed.2d 973 (1980), the Court held that the First Amendment protects the right of press and public to attend criminal trials. I do not interpret that decision to shelter every right that is 'necessary to the enjoyment of other First Amendment rights.' Instead, *Richmond Newspapers* rests upon our long history of open criminal trials and the special value, for both public and accused, of that openness. As the plurality opinion in *Richmond Newspapers* stresses, 'it would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted.' *Thus, I interpret neither Richmond Newspapers nor the Court's decision today to carry any implications outside the context of criminal trials.*" [c.o.]

457 U.S., at 611 (O'Connor, J., concurring). At the same time, Chief Justice Burger pointed out in dissent that under the Court's decision in *Globe Newspapers*:

> "Although states are permitted, for example, to mandate the closure of all proceedings in order to protect a 17-year-old charged with rape, they

> are not permitted to require the closing of part of criminal proceedings in order to protect an innocent child who has been raped or otherwise sexually abused."

457 U.S., at 612 (Burger, C.J., dissenting). As with *M.L.B.* we conclude that there is nothing in *Globe Newspapers* holding that TPR proceedings are to be treated like criminal trials in all respects and especially that they are required by the Sixth Amendment to be open.

We therefore once again reject the Sixth Amendment model for TPR proceedings. Under *M.L.B.*, the court proceedings in TPR cases are still civil, even though they partake of some of the aspects of constitutional adjudication in certain criminal prosecutions. It is only some of the process that is due in TPR cases that can conceivably be likened to criminal cases under *M.L.B.* The right to judicial access and the right to counsel in TPR cases are part of a process designed to insure that the final result is reliably the correct one. Just as the purpose in the process in criminal cases is to assure that only the guilty are convicted, so in TPR cases the process is designed to guarantee that only parents who have been reliably and confidently shown to have violated statutory norms can have their family associational rights permanently ended.

None of this applies to the issue we face in this case. The State of Florida has made a policy decision through its elected representatives that it is in the best interest of all that TPR hearings be conducted behind closed courthouse

doors.[5] Indeed, given the nature of the proceeding, the kind of evidence that is usually adduced in such cases, and the reasonably predictable adverse effects on the children caused by public knowledge of the underlying facts, it seems apparent to us that the state has substantial and compelling governmental purposes to support it. We distinguish the present situation from *Globe Newspaper*, where the Court found the harm to the child witness insufficient to carry the State's burden of a governmental interest compelling enough to overcome the Sixth Amendment requirement of a public criminal trial. In a TPR case, where the entire purpose is to protect young and vulnerable children, we think the State of Florida has a much stronger interest in closing such hearings. That interest is apparent from the evidence in this case demonstrating that public hearings would have a direct adverse effect on the child who is the subject.

We are also influenced by our own supreme court's decision in *Barron v. Florida Freedom Newspapers Inc.*, 531 So. 2d 113 (Fla. 1988), which involved the closure of a substantial part of a divorce case file. Admittedly the court there held that there is a strong presumption of openness in civil judicial proceedings in Florida state courts and that the burden for closing civil court proceedings is on the party seeking closure. But the court also stated that:

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5. In *In re the Adoption of H.Y.T.*, 458 So. 2d 1127 (Fla. 1984), our state supreme court upheld the statute closing all adoption proceedings. *See* § 63.162 Fla. Stat. (1997). The attack in *H.Y.T.* was based on the media's right of access to judicial proceedings rather than on a comparison, as here, with criminal prosecutions.

Appendix B

> "*While Florida, as a matter of public policy, has expressly made certain civil proceedings confidential (adoptions, § 63.162,* Fla. Stat. (1987); paternity, § 742.031, Fla. Stat. (1987); *juvenile proceedings, § 39.09 and 39.408, Fla. Stat. (1987)) and some states have enacted legislation limiting public access to divorce proceedings, the Florida Legislature has chosen not to do so.*" [e.s., c.o.]

531 So. 2d, at 119. The court thus recognizes a small number of exceptions to the general policy of openness where the legislature has expressly deemed a discrete kind of proceeding in need of shelter from the affecting glare of public attention. All of the categories in the recognized exception in *Barron* concern children or their relationship to their families. Undeniably within this distinct category of exceptions in *Barron* are TPR proceedings.[6] Thus the statute we construe today is one of the very few statutes enforcing an express public policy of closure that are implicitly recognized and tolerated in *Barron.*

In the end, we are not satisfied that the parents have carried the heavy burden imposed on them and that they have made it to appear clearly that, as they have argued here and in the trial court, the statute is unconstitutional under the Sixth and Fourteenth Amendment. Accordingly we quash the decision holding section 39.467 unconstitutional and return the case to the circuit court for further proceedings.

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6. We do not understand the court's listing of statutes to be exhaustive, merely suggestive.

To facilitate further review, however, of this issue of great public importance, we hereby certify the following question of constitutionality to the supreme court:

> *"Is § 39.467(4), now § 39.809(4), Fla. Stat. (Supp. 1998), requiring a mandatory closure of all hearings in TPR proceedings valid under the United States and Florida constitutional provisions respecting access of the public and media to judicial proceedings?"*

STEVENSON and SHAHOOD, JJ., concur.

* * * *

APPENDIX C — ORDER OF THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA ON NATURAL PARENTS' MOTION TO DECLARE UNCONSTITUTIONAL FLORIDA STATUTE §§ 39.467(3) AND (4) DATED JUNE 11, 1998

IN THE CIRCUIT COURT OF THE
17TH JUDICIAL CIRCUIT, IN AND
FOR BROWARD COUNTY, FLORIDA

CASE NO. 96-4635 CJ-DP
JUVENILE DIVISION
JUDGE: T.M. Lynch

IN THE INTEREST OF:

JENNIFER BUSH (DOB 5/22/87)
a minor child

ORDER ON NATURAL PARENTS' MOTION TO DECLARE UNCONSTITUTIONAL FLORIDA STATUTE §§ 39.467(3) AND (4), AND TO REQUIRE THE PARENTAL TERMINATION PROCEEDINGS IN THIS CASE TO BE OPEN, AND TO REQUIRE A TRIAL BY JURY

THIS CAUSE came before the court on Natural Parents' Motion to Declare Unconstitutional Florida Statute §§ 39.467(3) and (4), and to Require the Parental Termination Proceedings in this Case to be Open, and to Require a Trial by Jury, and the court having heard argument of counsel, this court finds and concludes as follows:

Appendix C

Natural Parents' Motion to Declare Florida Statute § 39.467(4) Unconstitutional

The Natural Parents' Motion to Declare Florida Statute § 39.467(4) Unconstitutional is met at the outset with a "strong presumption in favor of the constitutionality of [the] statute." *State v. Kinner*, 398 So. 2d 1360, 1363 (Fla. 1981). "The courts should not and must not annul, as contrary to the Constitution, a statute passed by the Legislature unless it can be said that it positively and certainly is opposed to the Constitution." *Greater Loretta Imp. Ass'n v. State ex rel. Boone*, 234 So. 2d 665, 671 (Fla. 1970). Thus, the Natural Parents have a heavy burden in their attempt to invalidate Florida Statute § 39.467(4) as violative of the Constitution.

However, notwithstanding the presumption of constitutionality, any attempts to close courtroom doors must be closely scrutinized. "The traditional Anglo-American distrust for secret trials has been variously ascribed to the notorious use of the practice by the Spanish Inquisition, to the excesses of the English Court Star Chamber, and the French monarchy's abuse of the lettre de cachet. All of these institutions obviously symbolized a menace to liberty." *In re Oliver*, 333 U.S. 257, 272-73, 68 S. Ct. 499, 507, 92 L. Ed. 682 (1948). This strong tradition of public access to trials, coupled with the promotion of fairness and enhanced public confidence in the judicial system that necessarily flow from open courtrooms, is sufficient to overcome the presumption in favor of the statute's constitutionality.

The United States Supreme Court has made it abundantly clear that any per se rule of closure for criminal proceedings is unconstitutional. *See generally Press Enterprise Co. v.*

Superior Court, 464 U.S. 501, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 102 S. Ct. 2613, 73 L. Ed. 2d 248 (1982); *Richmond Newspapers v. Virginia*, 448 U.S. 555, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980). The Supreme Court of Florida has further stated that "the public and press have a right to know what goes on in a courtroom whether the proceeding be civil or criminal." *State ex rel Miami Herald Publishing v. Mcintosh*, 340 So. 2d 904, 908 (Fla. 1977). The Fourth District Court of Appeal added that "this 'open-court' concept is an indispensable part of our system of government and our way of life." *Goldberg v. Johnson*, 485 So. 2d 1386, 1389 (Fla. 4th DCA 1986). A long history of Constitutional interpretations reveals that mandatory closure rules that do not allow for any judicial discretion are suspect under the Constitution. *See e.g. Globe Newspaper Co. supra.*

Plaintiff argues, and this court agrees, that parental termination proceedings involve sensitive information that may be worthy of protection. Despite the fact that the benefits of public access to the courtroom would be proper in at least some cases, Florida Statute § 39.467(4) affords a judge no discretion to make such a determination on a cases-by-case basis. It allows no discretion, no balancing, no weighing of factors. On its face it violates the historical Anglo-American open-court principle embedded in the Fourteenth Amendment.

A balancing between the right of public access to judicial proceedings and the interests regarding closure is necessary before such a strong tradition of public access can be denied. The Supreme Court of Florida has adopted such a balancing test in the context of access to court records. *Goldberg*, 485 So. 2d at 1388-89. However, Florida Statute § 39.467(4)

requires mandatory closure of all such proceedings, regardless of the weight given to the competing factors in a given case. A statute requiring closure in all parental termination proceedings, without any discretion to determine whether closure is necessary, is overbroad and not narrowly tailored enough to survive Constitutional scrutiny. *Globe Newspaper Co.* 457 U.S. at 609-10 (reasoning that statutes requiring mandatory closure cannot be viewed as a narrowly tailored means of accommodating the State's asserted interests).

Plaintiff argues that *In re Adoption of H.Y.T.* controls in the case at bar. 458 So. 2d 1127 (Fla. 1984) (upholding constitutionality of statute requiring closure in adoption proceedings). The Supreme Court of Florida's decision was based on a determination that adoption proceedings are qualitatively different from other judicial proceedings. *Id.* at 1128. Noting the Court's reliance on the nature of the proceeding at issue, this court will examine the nature of a parental termination proceeding.

Parental termination proceedings are unique in that they do not fit neatly within the classification of "civil" or "criminal." *See M.L.B. v. S.L.J.*, 519 U.S. 102, 117 S. Ct. 555, 564-65, 136 L. Ed. 2d 473 (1996). However, "[f]ew forms of state action, . . . are both so severe and so irreversible . . . The parent's interest [is] far more precious than any property right." *Id.* Because "parental status termination is 'irretrievably destructi[ve]' of the most fundamental family relationship," Plaintiff's reliance on *In re Adoption of H.Y.T.* is misplaced.

In adoption proceedings, prospective parents are not in danger of losing any existing rights. In contrast, parents in

parental termination proceedings are faced with a far greater risk of loss. Although it would be improper to classify the possible consequences of a parental termination proceeding as punitive, the fact that "[f]ew consequences of judicial action are so grave as the severance of natural family ties," *M.L.B.*, 117 S. Ct. at 565, makes proceedings under Florida Statute § 39.467(4) fundamentally different from adoption proceedings. Therefore, the Natural Parents, whose actions will be at the center of the proceeding, should have a right to have the court determine if they should be given the full benefits of a public hearing.

Furthermore, it is improper to conclude that the Florida Legislature intended to keep all such parent/child hearings closed to the public. Florida Statute § 39.408(2)(c) requires that many hearings in dependency cases be open to the public. Such hearings often precede parental termination actions and involve public disclosure of much of the same information. If similar information has already been revealed to the public, then any compelling reason for closure in the parental termination proceeding is severely undermined.

Regardless of the extent of publication of the underlying facts surrounding the case at bar[1], the promotion of fairness and enhanced public confidence in the judicial system comes from the reporting of the proceeding itself. Thus, any argument that the public already has sufficient information regarding the instant case is not persuasive.

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1. This case has received extensive media and press coverage locally and nationwide. *See* Natural Parents' Notice of Filing Exhibits (Press Coverage)

Appendix C

The goal of the right of access to trials is achieved by reporting information concerning the proceeding itself, the Natural Parents want their hearing open to the public, and the extensive press coverage in the instant case severely undermines any privacy interests the state or the minor child might have. Although a proper balancing of the competing interests may result in an open hearing, Florida Statute § 39.467(4) does not allow for any judicial discretion on this matter. Accordingly, since the statute is overbroad and not narrowly tailored, Florida Statute § 39.467(4) is hereby deemed UNCONSTITUTIONAL.

Natural Parents' Motion to Declare Florida Statute § 39.467(3) Unconstitutional

Natural Parents' Motion to Declare Florida Statute § 39.467(3) Unconstitutional must overcome the same presumption of constitutionality discussed above. However, regarding Florida Statute § 39.467(3), the Florida Legislature has greater flexibility in drafting statutes that limit the right to jury trials.

The Supreme Court of Florida, in holding that the state constitution does not require trial by jury in civil commitment proceedings, restated the constitutional limitations imposed on legislation affecting the right to jury trials. *In re Mabel Jones*, 339 So. 2d 1117, 1118 (Fla. 1976). "[T]he provision of our constitution that 'the right of trial by jury shall be secured to all' merely secured it in those cases in which it was a matter of right before the adoption of the constitution [in 1885]." *Id.* Therefore, the fact that parental termination proceedings under the Florida Statutes did not exist when

the Florida Constitution was adopted gives the Florida Legislature greater leeway in altering the right to a jury in parental termination proceedings.

Natural Parents' argue that the possibility of severe consequences in a parental termination proceeding requires this court to find a right to a jury trial. However, the Supreme Court of Florida opinion in *In re Mabel Jones* does not support this argument. Despite the fact that a civil commitment hearing may lead to a denial of personal freedom by incarceration, the Court held that the legislature acted appropriately in denying the right to a jury in such proceedings. *See id.* The rights and consequences at issue in a parental termination proceeding, while significant, are certainly no more important than the possible loss of physical freedom of someone facing involuntary civil commitment. *In re Mabel Jones* implicitly rejects the argument that the severity of the possible consequences in a proceeding is dispositive in determining the right to a jury.

Even though the Federal Constitution does not mandate a jury trial in parental termination proceedings, Natural Parents' Motion is correct in stating that Florida's constitutional right to jury trial decisions have "recognized that federal decisions construing [the Seventh Amendment] are helpful and persuasive in construing this states's constitutional provision of like import." *In re Forfeiture of 1978 Chevrolet Van*, 493 So. 2d 433, 44-45 (Fla. 1986). However, Florida Statute § 39.467(3) already reflects Florida's construction of the state constitution regarding the right to jury trials in parental termination proceedings. Since the legislature was acting within its authority to make such

a determination, and because the constitution does not prohibit such a determination, the presumption in favor of constitutionality of Florida Statute § 39.467(3) has not been rebutted. Accordingly, Natural Parents' Motion to Declare Florida Statute § 39.467(3) Unconstitutional is hereby DENIED.

WHEREFORE it is ORDERED AND ADJUDGED that; Florida Statute § 39.467(4) is hereby deemed UNCONSTITUTIONAL; and Natural Parents' Motion for a Jury Trial is hereby DENIED.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida this 11 day of June, 1998.

s/ Thomas M. Lynch, IV
Thomas M. Lynch, IV –
Circuit Judge

(2)

Supreme Court, U.S.
FILED
JUN 19 2001
OFFICE OF THE CLERK

No. 00-1749

In the Supreme Court of the United States

NATURAL PARENTS OF J.B.,

Petitioners,

v.

FLORIDA DEPARTMENT OF
CHILDREN AND FAMILIES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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12 pp

QUESTION PRESENTED

Respondent does not agree with the question presented in the Petition. For the reasons discussed *infra* (page 6), Respondent restates the question presented as follows:

> Does a statute which protects the privacy of children by mandating closure of termination of parental rights proceedings violate the parents' right to due process under the Fourteenth Amendment?

TABLE OF CONTENTS

Question Presented i

Table of Authorities iii

Statement of the Case 1

Reasons for Denying the Writ 3

Conclusion 7

TABLE OF AUTHORITIES

Cases:

Barron v. Florida Freedom Newspapers, Inc.,
531 So. 2d 113 (Fla. 1988) 2

Florida Freedom Newspapers, Inc. v. Simmons,
508 So. 2d 462 (Fla. 1st DCA 1987) 2

Globe Newspaper Co. v. Superior Court,
457 U.S. 596 (1982) 4,5

In re Adoption of H.Y.T.,
458 So. 2d 1127 (Fla. 1984) 6

Lassiter v. Department of Social Services,
452 U.S. 18 (1981) 3

New Jersey Div. of Youth & Family Servs. v. J.B.,
576 A.2d 261 (N.J. 1990) 6

Press-Enterprise Co. v. Superior Court,
464 U.S. 501 (1984) 4

Richmond Newspapers, Inc. v. Virginia,
448 U.S. 555 (1980) 4

Santosky v. Kramer, 453 U.S. 745 (1982) 3,6

Schall v. Martin, 467 U.S. 253 (1984) 3,5,6

Smith v. Daily Mail Co. 443 U.S. 97 (1979) 5

Florida Statutes (2000):

§ 20.19 1

§ 29.827 6

§ 39.001 4

§ 39.01 1

§ 39.501 3

§ 39.801 3,6

§ 39.806 4

§ 39.808 6

§ 39.809 6

§ 39.810 4

§ 39.814 4

§ 63.162 6

§ 742.16 6

Other Authorities:

Art. I, § 23, Fla. Const. 2

STATEMENT OF THE CASE

The Statement of the Case in the Petition is generally accurate;[1] however, several points warrant clarification and expansion.

First, the Petition notes that the parents unsuccessfully sought to close the dependency proceeding, but omits several important details. Pet. at 3. Specifically, the parents argued that it would be against the child's interests if the dependency proceedings were open and they presented testimony of the child's treating psychologist who opined that it was "imperative" that the proceedings be closed. Pet. App. at 28a-29a. Respondent did not oppose the closure of the dependency proceeding. Id. Although the trial court denied the parents' request to close the dependency proceeding, it did so without prejudice to the possible closure of future proceedings in the case. Pet. App. at 29a. After the character of the proceeding changed from dependency to termination of parental rights (TPR), the parents changed their position and sought to have the proceedings opened. Id. There is nothing in the record which would rebut the opinion of the child's psychologist or otherwise indicate that closure of the proceedings is no longer in the child's best interests.

Second, the Petition overstates the positions taken by the two dissenting justices. Pet. at 6. They did not conclude that the statute requiring mandatory closure of TPR proceedings is unconstitutional, only that it "may be constitutionally infirm." Pet. App. at 23a (Pariente, J., concurring) (emphasis

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[1] It should be noted that the pleadings and decisions below do not "misstate the name of the State agency" who is the Respondent herein. Pet. at 1 n.1. The correct name of the agency is the Department of Children and Family Services. *See* §§ 20.19, 39.01(19), Fla. Stat. (2000).

supplied).[2] Moreover, the ellipses in the quotation on page 6 of the Petition omit an important part of the statement as set forth below in bold-faced type:

> [I]n order to pass constitutional muster **under our decision in *Barron*,**[3] the decision to close TPR proceedings should be vested in the sound discretion of the trial court on a case-by-case basis, ...

Pet. App. at 26a (emphasis and footnote supplied). *Barron* involved the dissolution of a marriage without minor children. 531 So. 2d at 114. The court in that case did not expressly discuss the First or Fourteenth Amendment; instead the court focused on a balancing of the common law tradition of open trials with the right of privacy in the Florida Constitution.[4] *See id. And see Florida Freedom Newspapers, Inc. v. Simmons*, 508 So. 2d 462, 465 (Fla. 1st DCA 1987) (Nimmons, J., concurring in result) ("We need not decide whether the First Amendment is applicable in the closure of civil cases."), *approved sub nom Barron v. Florida Freedom Newspapers, Inc.*, 531 So. 2d 113 (Fla. 1988).

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[2] Indeed, Justice Anstead would have avoided the constitutional issue altogether by "construi[ing] the statute as creating a presumption in favor of closure, while still permitting courts to determine access on a case-by-case basis." Pet. App. at 22a. And see id. at 14a.

[3] *Barron v. Florida Freedom Newspapers, Inc.*, 531 So. 2d 113 (Fla. 1988).

[4] *See* art. I, § 23, Fla. Const. ("Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein. . . . .").

REASONS FOR DENYING THE WRIT

The Petition should be denied because it does not present an important, unsettled federal question that was decided by the Florida Supreme Court in a way that conflicts with decisions of this Court, the federal courts of appeal, or another state court of last resort. The Florida Supreme Court's decision is consistent with this Court's precedent and it should not be disturbed. As the Florida Supreme Court recognized, civil proceedings involving juveniles "have historically been closed to the public" (Pet. App. at 6a-8a) and Petitioners' continued reliance on the historical openness of criminal and non-juvenile civil proceedings is therefore misplaced.

This is a juvenile case.[5] It arises out of the State of Florida's efforts to ensure the care, safety and protection of the child, J.B., through its juvenile justice system.[6] This Court has consistently recognized that the foundation of the juvenile justice system is preservation of the welfare of the child in light of the State's *parens patriae* interest in its children. *See, e.g., Schall v. Martin*, 467 U.S. 253, 263 (1984) (citing *Santosky v.*

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[5] Petitioners' efforts to analogize this case to a criminal case are misplaced. Pet. at 7. As Justice Berger noted in *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981):

> The purpose of the termination proceeding at issue here was not "punitive." On the contrary, its purpose was *protective* of the child's best interests.

Id. at 34 (Burger, J., concurring) (italics original and citations omitted).

[6] The TPR case and the dependency case which preceded it were brought under chapter 39, Florida Statutes, which is entitled "proceedings related to children." Proceedings under chapter 39 are governed by the Florida Rules of Juvenile Procedure promulgated by the Florida Supreme Court. *See* §§ 39.501(3)(b) (dependency cases), 39.801(1) (TPR cases), Fla. Stat. (2000).

Kramer, 455 U.S. 745 (1982)).

The purpose of TPR proceedings in Florida is likewise to ensure the best interests of the child. *See* § 39.810, Fla. Stat. (2000) ("In a hearing on a petition for termination of parental rights, the court shall consider the manifest best interests of the child"). *Accord id.* at § 39.001(1)(b)1. ("The health and safety of the children served [by the State's child protection system] shall be of paramount concern."). The statute mandating closure of TPR hearings promotes that interest by protecting the child from further psychological and emotional harm which might result from the public disclosure of the sensitive information which is necessarily part of a TPR hearing. *See* § 39.806, Fla. Stat. (2000) (listing the grounds for terminating parental rights, including sexual and other abuse, neglect, etc.). *And cf.* § 39.814, Fla. Stat. (2000) (providing for confidentiality of court records in TPR cases). In light of the tradition of closed juvenile proceedings, it was within the province of the Florida Legislature to balance the competing interests and determine that the interests of the child far outweighed those of the parents and therefore mandate closure of TPR hearings.[7]

The cases cited by Petitioners in support of "the broad principle of openness of judicial proceedings articulated by this Court" are inapplicable.[8] Each of those cases arose out of a criminal proceeding. As Justice O'Conner stated in her

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[7] The legislative balancing is evident in section 39.001(1)(l) (recognizing and assuring consideration of the parents' rights) and section 39.001(1)(a)-(b) (discussing the paramountcy of the child's best interest).

[8] Pet. at 11 (citing *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984), *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982), and *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980)).

concurring opinion in *Globe Newspaper Corp.*, "I interpret neither *Richmond Newspapers* nor the Court's decision today to carry any implications outside of the contest of criminal trials." 457 U.S. at 611. More specifically, it does not appear that the principle has implications beyond adult criminal proceedings as the Court has consistently discussed the importance of confidentiality in juvenile proceedings, including quasi-criminal juvenile delinquency proceedings. *See, e.g., Smith v. Daily Mail Pub. Co.*, 443 U.S. 97 (1979):

> It is a hallmark of our juvenile justice system in the United States that virtually from its inception at the end of the last century its proceedings have been conducted outside of the public's full gaze and the youths brought before our juvenile courts have been shielded from publicity. This insistence on confidentiality is born of a tender concern for the welfare of the child, to hide his youthful errors and "bury them in the graveyard of the forgotten past."

Id. at 107 (Rehnquist, J., concurring) (citations omitted). *And see Schall*, 467 U.S. at 263 (noting that "a juvenile proceeding fundamentally different from an adult criminal trial").

Petitioners also assert that review of the Florida Supreme Court's decision is necessary because the Florida statute at issue is "the minority view among the states."[9] Pet. at 9. This

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[9] The statute at issue in this case is consistent with the public policy expressed by the Florida Legislature in other statutes which mandate closure of judicial proceedings involving children. *See, e.g.*, §§ 63.162 (adoption proceedings), 742.16 (parental status in cases involving gestational surrogacy), 29.827 (hearings for appointment of guardians ad litem). The Florida Supreme Court upheld the mandatory closure of adoption proceedings in *In re Adoption of H.Y.T.*, 458 So. 2d 1127 (Fla. 1984).

factor is certainly not determinative, *see, e.g., Schall*, 467 U.S. at 268, and in any event the Florida statute is consistent with the majority view that there is no presumptive right of access to TPR proceedings. See Pet. at 10 (citing only 13 states in which TPR hearings are presumptively open). The differing statutes across the nation demonstrates that the issue is best left to the state legislative bodies. Indeed, the only case cited by Petitioners in support of their contention that "the state courts are divided" on the question presented arose in a state where the legislative body has not adopted a statute governing access to TPR proceedings. *See* Pet. at 9 (citing *New Jersey Div. of Youth & Family Servs. v. J.B.*, 576 A.2d 261, 266 (N.J. 1990)); *and see* Pet. at 10 n.9 (listing New Jersey as a state which has not statutorily addressed access to TPR proceedings). Thus, any conflict in that decision and the decision of the Florida Supreme Court in this case is, at most, indirect.

Finally, this is not a case where the press or a member of the general public is seeking access to a statutorily closed proceeding. The only parties to this case are the parents, and they clearly have a right of access to the TPR proceeding. *See* §§ 39.801(3), 39.808, 39.809, Fla. Stat. (2000). The First Amendment right of access which the Petition seeks to vindicate is that of the general public. In contrast, the only question fairly presented by the parents is whether the mandatory closure of the TPR proceedings is "fundamentally fair." *See Santosky, supra.* Accordingly, if the Court grants the Petition notwithstanding the foregoing argument, it should do so based upon the restated question presented herein.

CONCLUSION

The petition for writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

NATURAL PARENTS OF J.B.,

Petitioners,

v.

FLORIDA DEPARTMENT OF CHILDREN AND FAMILIES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

REPLY BRIEF

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I. THE RESPONDENT'S BRIEF FAILS TO RECOGNIZE THE FUNDAMENTAL RIGHTS OF THE NATURAL PARENTS THAT ARE AT STAKE IN A STATE-INITIATED PROCEEDING TO TERMINATE PARENTAL RIGHTS

The Respondent, the Florida Department of Children and Family Services [the State], writes that "[t]his is a juvenile case." (Br. in Opp., p. 3). It is not. Minors adjudicated delinquent in juvenile court get their liberty back. Parents who lose a parental termination case never get their child back.

In *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996), this Court recognized that "parental termination decrees are among the most severe forms of state action." *Id.* at 128.

> The object of the proceeding is "not simply to infringe upon [the parent's] interest," . . . "but to end it"; thus, a decision against the parent "work[s] a unique kind of deprivation."

Id. at 118 (*quoting Lassiter*, 452 U.S., at 27). *See also Santosky v. Kramer*, 455 U.S. 745, 758-59 (1982) (describing the parents' interest as "an interest far more precious than any property right"); *M.L.B. v. S.L.J.*, 519 U.S. 102, 121 (1996) ("parental status termination is 'irretrievabl[y] destructi[ve]' of the most fundamental family relationship") (*quoting Santosky,* 455 U.S. at 753).

The State's simplistic view that this is just "a juvenile case" is based upon the fact that a termination of parental rights proceeding in Florida is brought under Chapter 39, Florida Statutes, entitled "proceedings related to children,"

and the Florida Rules of Juvenile Procedure apply. (Br. in Opp., p. 3 n.6). But just as cases litigated under the Rules of Civil Procedure may differ in the interests at stake, the various proceedings governed by the Rules of Juvenile Procedure (delinquency, dependency, termination of parental rights, proceedings for families in need of services, guardian advocates for drug dependent newborns) also differ in the interests at stake. The State's view that closure of some juvenile proceedings justifies the closure of *all* "juvenile" proceedings exalts a label, not a principled assessment of the liberty interests at stake. This Court has rejected the notion that labels drive legal analysis. *Compare*, *Breed v. Jones*, 421 U.S. 519, 529 (1975) ("[I]t is clear under our cases that determining the relevance of constitutional policies, like determining the applicability of constitutional rights, in juvenile proceedings, requires that courts eschew 'the "civil" label-of-convenience which has been attached to juvenile proceedings,' *In re Gault*, . . . 387 U.S. at 50 . . . and that 'the juvenile process . . . be candidly appraised.' 387 U.S. at 21 . . . .").

Respondent contends that the open judicial proceedings precedents relied upon in the petition are "inapplicable" because they arose out of criminal proceedings, and this is not a criminal case. (Br. in Opp., p. 4 and n.8). But the Court in *M.L.B. v. S.L.J.* recognized that a parent subjected to termination of parental rights is not unlike a defendant subjected to termination of liberty in a criminal proceeding: "Like a defendant resisting criminal conviction, [M.L.B., the mother contesting a TPR proceeding] seeks to be spared from the State's devastatingly adverse action." 519 U.S. at 125. Thus, the open criminal proceedings cases provide constitutionally relevant analogies that may inform this Court's decision to grant review of a decision that bolts the

door to the courtroom and insulates all termination of parental rights proceedings from the public.[1]

II. THE RESPONDENT'S RELIANCE ON THE CLOSURE OF "JUVENILE JUSTICE" PROCEEDINGS IS MISPLACED

The State asserts that "[t]he Florida Supreme Court's decision is consistent with this Court's precedent and it should not be disturbed." (Br. in Opp., p. 3). However, the State does not cite a single decision from this Court in support of that statement. Nor is there a case cited in the entire Brief in Opposition favoring a mandated closure of any judicial proceedings. There is no such decision.

As did the court below (Pet. Cert. App. 7a), the State quotes from then-Justice Rehnquist's concurring opinion in *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97, 107 (1979), which noted that juvenile justice proceedings are historically "shielded from publicity." The context of the quoted material, however, is in a lengthy discussion of the concerns for protecting a minor charged with a criminal offense, and has no relevance to a termination of parental rights proceeding. *See id.* (Rehnquist, J., concurring) ("This insistence on confidentiality is born of a tender concern for the welfare of the child, to hide his youthful errors and bury them in the graveyard of the forgotten past.") (internal quotations omitted). The concurrence was interesting, but the holding

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1. In protecting an indigent mother's right to have a transcript to appeal a termination of parental rights decree, *M.L.B.* used the same metaphor: "[W]e place decrees forever terminating parental rights in the category of cases in which the State may not "bolt the door to equal justice," *Griffin*, 351 U.S. at 24, 76 S. Ct. at 593 (Frankfurter, J., concurring in judgment). . . ." 519 U.S. at 123.

of the case was that the state could not criminally punish the truthful publication of an alleged juvenile delinquent's name lawfully obtained by a newspaper. *Smith v. Daily Mail Pub. Co.*, 443 U.S. at 105-06. Thus, despite the important interests articulated in the concurrence, the Court favored the First Amendment over the State's asserted interest in the confidentiality of juvenile proceedings. If anything, *Daily Mail* supports certiorari in this case.

The only other case cited by the State is *Schall v. Martin*, 467 U.S. 253 (1984), another case involving juveniles charged with criminal offenses. *Schall's* comment that the practices of states are "plainly worth considering" in constitutional analysis, 467 U.S. at 268, aids the Petitioners' request for certiorari. Florida's statutorily mandated *per se* closure of all parental termination proceedings is inconsistent with the practices of 47 other states. *See* Pet. Cert., pp. 9-10, nn.5-9. Whether the Florida practice offends constitutional principles is a question worthy of this Court's review.

CONCLUSION

For the foregoing reasons, and those advanced previously, the petition for writ of certiorari should be granted.

Respectfully submitted,

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